UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

99 Cr. 327-01 (RWS)

- against -

O P I N I O N

SILVIA MIRA,

Defendant.

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A P P E A R A N C E S:

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Sweet, D.J.,

Pro se petitioner Silvia Mira ("Mira") has moved the Court for an order of recommendation to the Immigration and Naturalization Service ("INS") that Mira be deported six months prior to the expiration of her term of imprisonment.

For the following reasons, that motion is denied.

Facts

Mira is a lawful resident of the United States, and a Colombian native.

On October 7, 1999, the Court sentenced Mira to a term of 57 months' imprisonment, five years' supervised release and a $100 special assessment, after she pleaded guilty to participating in a narcotics conspiracy involving 10 kilograms of cocaine. United States v. Mira, 1999 WL 799696 (S.D.N.Y. Oct. 6, 1999). The sentence was the result of a determination made by the Court after Mira entered a guilty plea pursuant to a plea agreement with the government.

By letter received June 11, 2002, Mira requested that the Court modify the sentence to provide for six months' early release so that she may be deported. The government responded by

letter dated August 22, 2002. Mira submitted a reply letter dated August 27, 2002, and the motion was considered fully submitted upon its receipt on September 3, 2002.

Discussion

It is unclear under what statute Mira seeks relief. The government has opposed the motion as though it were a request pursuant to 18 U.S.C. § 2255.

I. Standard of Review

In addressing the present motion, the Court is mindful that the plaintiff is proceeding pro se and that her submissions should be held "'to less stringent standards than formal pleadings drafted by lawyers . . . .'" Hughes v. Rowe, 449 U.S. 5, 9, 101 S.Ct. 173, 176 (1980) (per curiam) (quoting Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 595 (1972)); see also Ferran v. Town of Nassau, 11 F.3d 21, 22 (2d Cir. 1993). Indeed, district courts should "read the pleadings of a pro se plaintiff liberally and interpret them to raise the strongest arguments they suggest.'" McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994). Nevertheless, the Court is also aware that pro se status "'does not exempt a party from compliance with relevant rules of proce

dural and substantive law." Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) (quotations omitted).

II. To the Extent Mira Seeks a Downward Departure Pursuant to 18 U.S.C. § 2255, the Motion is Denied[1]

A petitioner may rely on § 2255 only to correct a defect in sentencing that raises constitutional, jurisdictional or other fundamental issues. E.g. United States v. Addonizio, 442 U.S. 178, 185 (1979). In the area of sentencing, a court may only employ § 2255 to remedy an error "which inherently results in a complete miscarriage of justice." United States v. Wright, 524 F.2d 1100, 1101 (2d Cir. 1975). Mira has not demonstrated that such a situation exists here. She does not allege that the sentence ordered by this Court was improper when imposed or now results in a fundamental miscarriage of justice. Rather, she appears to rely on § 2255 as a vehicle to obtain a six-month reduction in her sentence based on her status as a deportable alien who therefore is not entitled to be assigned to a halfway house. Such relief is not available pursuant to § 2255.

[1] Mira claims in reply papers that she does not rely on 18 U.S.C. § 2255. She does not, however, identify the statute on which she relies. Because Mira presumably seeks early release from her term of imprisonment, rather than a modification of her supervised release conditions, Rule 32.1(b) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3583(e)(2) do not apply. Thus, § 2255 appears to be Mira's only avenue of relief.

The Second Circuit, in United States v. Restrepo, 999 F.2d 640 (2d Cir. 1993), reviewed a decision to order a downward departure based on defendant's status as a deportable alien. The district court had agreed with the defendant that his status as a deportable alien subjected him to more severe penalties than non-alien prisoners because, inter alia, he was ineligible for reassignment to a halfway house pursuant to 18 U.S.C. § 3624 (c).[2] The Second Circuit concluded that "[e]ven if it were a steadfast policy of the Bureau to deny reassignment to relaxed-security facilities to alien prisoners who must be deported on account of their convictions, we would consider that policy an inappropriate basis for departure from the imprisonment range prescribed by the Guidelines." Id. at 645.

Several courts in this district have applied Restrepo to reach similar conclusions. E.g., Agostino v. United States, 1997 WL 220330, at *1-2 (S.D.N.Y. April 25, 1997); Rivera v. United States, 866 F. Supp. 1238 (S.D.N.Y. 1995); Rodriguez v. United States, 866 F. Supp. 783, 785 (S.D.N.Y. 1994).

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[2] Pursuant to 18 U.S.C. § 3624(c), the Bureau of Prisons ("BOP") "shall, to the extent practicable, assure" that a prisoner spend some portion of the last 10% of the term of imprisonment under conditions that will allow the prisoner to prepare for "re-entry into the community." Usually, such preparatory re-entry involves assignment to a minimum security facility such as a halfway house. Untied States v. Restrepo, 999 F.2d 640, 645 (2d Cir. 1993). The statute does not mandate that all prisoners be afforded the opportunity to participate in such a program. Id. However, the BOP typically denies the applications of aliens such as Mira to participate in this program. United States v. Lopez-Salas, 266 F.3d 842, 849 (8th Cir. 2001); Thomas v. United States, 1995 WL 590650 (S.d.N.Y. Oct. 5, 1995).

Therefore, to the extent that Mira seeks a downward departure based on the fact that she is not entitled to assignment at a halfway house, her motion is denied.

As petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253; see also United States v. Perez, 129 F.3d 255, 259-60 (2d Cir. 1997); Lozada v. United States, 107 F.3d 1011 (2d Cir. 1997). The Court certifies pursuant to 28 U.S.C. § 1915(a) that any appeal from this order would not be taken in good faith. Coppedge v. United States, 369 U.S. 438 (1962).

Conclusion

For the foregoing reasons, Mira's motion is denied.

It is so ordered.

New York, NY
September 18, 2002

ROBERT W. SWEET
U.S.D.J.